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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
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11 ANTHONY LA'WAYNE  
12 ROBINSON,

13 Petitioner,

14 v.

15 MIKE EVANS,

16 Respondent.  
17

Case No. CV 08-5009-RSWL (OP)

ORDER TO SHOW CAUSE RE:  
DISMISSAL OF PETITION FOR  
WRIT OF HABEAS CORPUS BY A  
PERSON IN STATE CUSTODY  
(28 U.S.C. § 2254) AS UNTIMELY

18 I.

19 **INTRODUCTION**

20 On July 24, 2008, Anthony La'Wayne Robinson ("Petitioner"),  
21 constructively filed the current Petition for Writ of Habeas Corpus by a Person in  
22 State custody pursuant to 28 U.S.C. § 2254 ("Petition").<sup>1</sup>  
23

24 <sup>1</sup> The prison mailbox rule holds that a habeas petitioner's state and federal  
25 filings are constructively filed when turned over to prison officials for  
26 forwarding to the Clerk of the Court. See, e.g., Smith v. Duncan, 297 F.3d 809,  
27 814 (9th Cir. 2002); Huizar v. Carey, 273 F.3d 1220, 1223 (9th Cir. 2001). The  
28 Court has utilized the signature date on the current Petition as the relevant filing  
date since the signature date is the earliest date on which Petitioner could have  
turned the Petition over to the prison authorities for mailing.

1 Pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the  
2 United States District Courts, the Court has examined the current Petition and  
3 finds that it plainly appears from its face that Petitioner is not entitled to relief in  
4 the district court. Specifically, the Court finds that the Petition is subject to  
5 summary dismissal because the information provided indicates that the Petition is  
6 untimely.

## 7 II.

### 8 PROCEDURAL HISTORY

9 On February 21, 1991, Petitioner was found guilty after a jury trial in the  
10 Los Angeles County Superior Court, case no. TA007067, of aiding and abetting  
11 murder in violation of California Penal Code section 187(a) and permitting  
12 another to shoot from a vehicle in violation of California Penal Code section  
13 12034(b). (Pet. at 2.) The jury also found true the allegations that he possessed a  
14 firearm during the commission of the offenses within the meaning of California  
15 Penal Code section 12022(b) and that he had sustained a prior serious felony  
16 conviction within the meaning of California Penal code section 667(a). (Id.) On  
17 March 29, 1991, Petitioner was sentenced to a total state prison term of twenty-  
18 three years to life. (Id.)

19 Petitioner appealed the judgment of conviction, and on February 1, 1993,  
20 the California Court of Appeal affirmed the judgment. (Id. at 3.) Petitioner then  
21 filed a petition for review in the California Supreme Court which was denied on  
22 May 12, 1993. (Id.)

23 According to the Petition, Petitioner filed the following habeas corpus  
24 petitions in the California Court of Appeal:

- 25 1) July 11, 2003: petition filed,  
26 July 16, 2003: petition denied;
- 27 2) October 15, 2003: petition filed,  
28 October 23, 2003: petition denied;

- 1           3)     October 29, 2004: petition filed,  
2                 November 24, 2004: petition denied;
- 3           4)     September 23, 2005: petition filed,  
4                 October 4, 2005: petition denied;
- 5           5)     December 6, 2005: petition re-filed,  
6                 January 17, 2006: petition denied;
- 7           6)     October 10, 2007: petition filed,  
8                 October 23, 2007: petition denied.

9     (Pet. at 3-7.)

10           According to the Petition and the Court's independent review of the  
11     California Supreme Court's website, Petitioner also filed the following habeas  
12     corpus petitions in the California Supreme Court:

- 13           1)     July 31, 2003: petition for review filed in case no. S118020,  
14                 September 10, 2003: petition denied;
- 15           2)     November 29, 2005: petition for writ of mandate filed in case no.  
16                 S139196,  
17                 December 1, 2005: case remanded to Court of Appeal  
18                 for consideration in light of Hagan v. Superior Court,  
19                 57 Cal.2d 767 (1962);
- 20           3)     January 12, 2006: habeas corpus petition filed in case no. S140335,  
21                 August 16, 2006: petition denied with citation to In re  
22                 Swain, 34 Cal.2d 300, 304 (1949), People v. Duvall, 9  
23                 Cal.4th 464, 474 (1995), and In re Dexter, 25 Cal.3d  
24                 921 (1979);
- 25           4)     September 19, 2006: habeas corpus petition filed in case no.  
26                 S146667,  
27                 March 28, 2007: petition denied with citation to In re  
28                 Robbins, 18 Cal.4th 770, 780 (1998); and



petition on those grounds. Herbst v. Cook, 260 F.3d 1039, 1043 (9th Cir. 2001).  
 However, that authority should only be exercised after a petitioner is provided  
 with adequate notice and an opportunity to respond. Id.

**B. The Petition Was Not Filed Within the Limitation Period.**

The current Petition was filed after the Antiterrorism and Effective Death  
 Penalty Act of 1996 (“AEDPA”) was signed into law and is, thus, subject to the  
 AEDPA’s one-year statute of limitations period, as set forth under 28 U.S.C. §  
 2244(d). See Calderon v. U. S. Dist. Court (Beeler), 128 F.3d 1283, 1286 (9th  
 Cir. 1997).<sup>3</sup> In most cases, the limitation period begins to run from “the date on  
 which the judgment became final by conclusion of direct review or the expiration  
 of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A). However,  
 where the conviction became final before the enactment of AEDPA on April 24,  
 1996, the day after AEDPA’s enactment becomes the date upon which the one-  
 year limitation period commences to run. See Malcolm v. Payne, 281 F.3d 951,  
 955 (9th Cir. 2002) (holding that AEDPA’s statute of limitations period for state  
 prisoners whose convictions became final prior to AEDPA’s enactment is from  
 and including April 25, 1996, to April 24, 1997); Patterson v. Stewart, 251 F.3d  
 1243, 1246 (9th Cir. 2001) (same).

As discussed above, Petitioner was convicted on February 21, 1991, and  
 sentenced on March 29, 1991. (Pet. at 2.) The California Court of Appeal  
 affirmed the judgment on February 1, 1993. (Id. at 3.) The California Supreme  
 Court denied the petition for review on May 12, 1993. (Id.) Petitioner did not  
 seek review with the United States Supreme Court, therefore, for purposes of the  
 AEDPA’s limitation period, his judgment of conviction became final ninety days  
 later, on August 10, 1993. See Bowen v. Roe, 188 F.3d 1157, 1158-59 (9th Cir.

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<sup>3</sup> Beeler was overruled on other grounds in Calderon v. U. S. Dist. Court (Kelly), 163 F.3d 530, 540 (9th Cir. 1998) (en banc).

1999) (the period of “direct review” in 28 U.S.C. § 2244(d)(1)(A) includes the period within which a petitioner can file a petition for writ of certiorari with the United States Supreme Court). However, since Petitioner’s conviction became final before the AEDPA’s enactment, the limitation period ended on April 24, 1997. 28 U.S.C. § 2244(d)(1)(A); see also Malcolm, 281 F.3d at 955. Petitioner did not constructively file the current Petition until July 24, 2008, over eleven years after the statute of limitations had run. Thus, unless Petitioner is entitled to statutory or equitable tolling or an alternate start date to the AEDPA’s limitations period under 28 U.S.C. § 2244(d)(1), it appears that the current Petition is untimely.

**C. Statutory Tolling of the Limitation Period Pursuant to 28 U.S.C. § 2244(d)(2)**

Title 28 U.S.C. § 2244(d)(2) provides that “[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.” Patterson, 251 F.3d at 1247.

The United States Supreme Court has held the statute of limitations is tolled where a petitioner is properly pursuing post-conviction relief. Carey v. Saffold, 536 U.S. 214, 219-21, 122 S. Ct. 2134, 2137-39, 153 L. Ed. 2d 260 (2002). The period tolled includes the intervals between one state court’s disposition of a habeas petition and the filing of a habeas petition at the next level of the state court system. Id. In Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999), the Ninth Circuit held that “the statute of limitations is tolled from the time the first state habeas petition is filed until the California Supreme Court rejects the petitioner’s final collateral challenge.” Claims denied as untimely or determined by the federal courts to have been untimely in state court will not satisfy the requirements for statutory tolling. Evans v. Chavis, 546 U.S. 189, 192-93, 126 S. Ct. 846, 163 L. Ed. 2d 684 (2006) (citing Carey, 536 U.S. at 222-

23).<sup>4</sup>

As set forth above, As set forth above, because Petitioner's conviction became final before the AEDPA's enactment, the limitation period ended on April 24, 1997. Statutory tolling is unavailable where, as here, Petitioner's first state habeas petition in the California Court of Appeal was not filed until July 11, 2003, over six years after the expiration of the AEDPA limitations period. (Pet. at 3-7.) Section 2244(d) does not permit the reinitiation of the AEDPA limitations period that has ended before a state habeas petition is filed. Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) (holding that § 2244(d) "does not permit the reinitiation of the limitations period that has ended before the state petition was filed," even if the state petition was timely filed); see also Jiminez v. Rice, 276 F.3d 478, 482 (9th Cir. 2001); Wixom v. Washington, 264 F.3d 894, 898-99 (9th Cir. 2001). For the same reason, Petitioner is not entitled to statutory tolling for any of his remaining habeas petitions filed in the California Court of Appeal or in the California Supreme Court.

Additionally, the state supreme court denied the last two habeas petitions with citation to In re Robbins, 18 Cal. 4th 770, 780 (1998). (Pet. at 3-10; Official Records of California Courts.) The pinpoint citation in Robbins deals entirely with the issue of timeliness with respect to a habeas corpus petition. As a result,

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<sup>4</sup> The Court in Evans held that a California Supreme Court order silent on the grounds for the court's decision is not equivalent to a holding that the filing was timely. Evans, 546 U.S. at 197-98. Thus, in the absence of clear direction or explanation from the California Supreme Court about the meaning of the term "reasonable time" (in which to file a habeas petition), or clear indication that a particular request for appellate review was timely or untimely, the federal court must itself examine the delay in each case and determine what the state courts would have held with respect to timeliness. Id. at 198. That is, "the federal court must decide whether the filing of the request for state-court appellate review (in state collateral review proceedings) was made within what California would consider a 'reasonable time.'" Id.



1 the state supreme court denied the petitions on timeliness grounds. Claims  
 2 denied as untimely or determined by the federal courts to have been untimely in  
 3 state court will not satisfy the requirements for statutory tolling. Evans, 546 U.S.  
 4 at 192-93 (citing Carey, 536 U.S. at 222-23).

5 Since Petitioner filed his state habeas petitions well after the AEDPA  
 6 limitations expired, he may not avail himself of statutory tolling to render the  
 7 current Petition timely. Thus, absent equitable tolling or an alternate start date  
 8 for the statute of limitations, it appears that the current Petition is untimely.

#### 9 **D. Equitable Tolling**

10 The one-year limitation period is subject to equitable tolling if a petitioner  
 11 demonstrates: “(1) that he has been pursuing his rights diligently, and (2) that  
 12 some extraordinary circumstance stood in his way.” Pace, 544 U.S. at 418.<sup>5</sup> A  
 13 petitioner bears the burden of alleging facts that would give rise to tolling. Id.  
 14 “[T]he threshold necessary to trigger equitable tolling under [the] AEDPA is very  
 15 high, lest the exceptions swallow the rule.” Miranda v. Castro, 292 F.3d 1063,  
 16 1066 (9th Cir. 2002) (internal quotation marks and citation omitted). This high  
 17 bar is necessary to effectuate the “AEDPA’s statutory purpose of encouraging  
 18 prompt filings in federal court in order to protect the federal system from being  
 19 forced to hear stale claims.” Guillory v. Roe, 329 F.3d 1015, 1018 (9th Cir.  
 20 2003) (internal quotation marks and citation omitted). Equitable tolling  
 21 determinations are “highly fact-dependent.” Whalem/Hunt v. Early, 233 F.3d  
 22 1146, 1148 (9th Cir. 2000) (en banc) (per curiam); accord Lott v. Mueller, 304  
 23 F.3d 918, 923 (9th Cir. 2002) (observing that equitable tolling determinations

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24  
 25 <sup>5</sup> The Supreme Court in Pace noted that it has “never squarely addressed  
 26 the question whether equitable tolling is applicable to AEDPA’s statute of  
 27 limitations.” Pace, 544 U.S. at 418 n.8. The Supreme Court declined to consider  
 28 the issue in that case and assumed for the sake of argument that it did, because  
 the respondent assumed as much, and the petitioner was not entitled to tolling  
 under any standard. Id.



“turn[ ] on an examination of detailed facts”). The face of the Petition and attached exhibits do not set forth any facts showing that Petitioner is entitled to equitable tolling. Thus, as set forth above, it appears that the current Petition is untimely.

**E. Alternate Start of the Statute of Limitations**

**1. State-Created Impediment.**

In rare instances, AEDPA provides that its one-year limitations period shall run from “the date on which the impediment of filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action.” 28 U.S.C. § 2244(d)(1)(B). Asserting that the statute of limitations was delayed by a state-created impediment requires a showing of a due process violation. Lott, 304 F.3d at 925. The face of the Petition and attached exhibits do not set forth any facts showing that Petitioner is entitled to relief under this provision.

**2. Newly Recognized Constitutional Right.**

The AEDPA also provides that, if a claim is based upon a constitutional right that is newly recognized and applied retroactively to habeas cases by the United States Supreme Court, the one-year limitations period begins to run on the date which the new right was initially recognized by the United States Supreme Court. 28 U.S.C. § 2244(d)(1)(C). The face of the Petition and attached exhibits do not set forth any facts showing that Petitioner is entitled to relief under this provision.

**3. Discovery of Factual Predicate.**

The AEDPA further provides that, in certain cases, its one-year limitations period shall run from “the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.” 28 U.S.C. § 2244(d)(1)(D). The face of the Petition and attached exhibits do not set forth any facts showing that Petitioner is entitled to relief

1 under this provision.

2 **IV.**

3 **ORDER**

4 Based upon the foregoing, the Court finds that the face of the Petition  
5 indicates that it is untimely. Accordingly, Petitioner is ordered to show cause  
6 why the Petition should not be dismissed as untimely by filing a response within  
7 thirty (30) days of the date of this Order. In the response to this Order to Show  
8 Cause ("OSC"), Petitioner shall make clear the dates on which any state habeas  
9 petition was filed and shall, if possible, attach copies of any state petition  
10 (showing that it was filed) and copies of the state court's decision addressing  
11 each petition. All facts relied upon by Petitioner must be proved by testimony  
12 contained in a declaration signed under penalty of perjury pursuant to 28 U.S.C.  
13 § 1746, or in properly authenticated documents. Petitioner must describe  
14 specifically the nature and duration of any extraordinary circumstances and their  
15 consequences in a declaration signed by him under penalty of perjury. Petitioner  
16 shall also include with his response properly authenticated prison records or  
17 documents which demonstrate any circumstance which Petitioner believes  
18 impeded his ability to timely file the current Petition.

19 Failure to comply with these requirements may result in the dismissal of  
20 this action for failure to prosecute and/or failure to comply with a court order.  
21 Failure to remedy the deficiencies discussed may also result in a recommendation  
22 that the action be dismissed.

23  
24 **IT IS SO ORDERED.**

25  
26 DATED: August 8, 2008

27   
28 **HONORABLE OSWALD PARADA**  
United States Magistrate Judge